Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAMES THOMSON

Petitioner

v.

WILLIAM P. SCHEID, et al.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether a public employee who exposes public corruption in the normal course of his employment is speaking out on matters of public concern so as to be protected by the First Amendment to the United States Constitution.

LIST OF PARTIES

Petitioner, James Thomson, was an employee of the Erie County Department of Human Services from January 1987 to October 6, 1987. The Petitioner was responsible for investigating suspected fraud by recipients of public funds in programs administered by the Erie County Department of Human Services.

Respondents are William P. Scheid, in both his individual and official capacity as Erie County Commissioner, Erie County Department of Human Services, and Catherine R. DeWalt, in her official capacity as Income Maintenance Administrator, Erie County Department of Human Services.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, James Thomson, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit dated October 19, 1992 is reported at 977 F.2d 1017 (6th Cir. 1992), and is reprinted as Appendix A to this Petition.

The opinion of the United States District Court for the Northern District of Ohio, dated October 8, 1991, is not officially reported and has been reprinted beginning as Appendix B to this Petition.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on October 19, 1992, affirming the grant of Summary Judgment entered by the District Court for the Northern District of Ohio.

On December 28, 1992, Petitioner's Motion for Application for Extension of Time to File for a Writ of Certiorari was granted by Justice Stevens of this Court to and including March 18, 1993.

The jurisdiction of this court to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit is invoked under 28 U.S.C. §1254(1) (1982).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves 42 U.S.C. §1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This case also involves the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the free of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

The Petitioner, James Thomson, at all times relevant herein was employed by Respondent Erie County Department of Human Services (hereinafter "the Department") as a fraud investigator. The Petitioner's duties included field and in-house investigations in cases of suspected fraud and fiscal recovery of overpayments involving ADC, food stamps, general assistance, and Medicaid programs. Petitioner Thomson had substantial discretion in his role as fraud investigator regarding the manner and vigor with which he pursued any particular investigation.

Respondent William P. Scheid at all times relevant herein was an elected public official, a County Commissioner for Erie County, Ohio. Respondent Scheid held power of attorney for Edna Scheid, his elderly aunt who was residing in a nursing home, and had prepared and signed all Medicaid application and redetermination forms which had been filed with the department on her behalf. Significantly, Respondent Scheid also was a

primary beneficiary of Edna Scheid's last will and testament and, therefore, stood to benefit personally to the extent that any Medicaid benefits received by Edna Scheid had the effect of preserving assets in her estate.

In February of 1987, Petitioner was assigned the task of investigating Respondent Scheid for fraud. The allegations against Respondent Scheid were that he intentionally submitted documents which contained false financial information concerning his aunt for the purpose of fraudulently obtaining Medicaid benefits.

Throughout the investigation, Petitioner was warned that his investigation of Commissioner Scheid could impact on his job. Both Catherine DeWalt, his supervisor, and Linda Van Tine, the director of the Department, warned the Petitioner to be cautious, given the politically sensitive nature of the matter.

Petitioner Thomson met and spoke with Respondent Scheid on three occasions regarding the suspected welfare fraud. Although Respondent Scheid had rarely spoken to department director Van Tine in the past, once the investigation began, Scheid repeatedly called Ms. Van Tine; he telephoned her repeatedly after each meeting he had with Petitioner. Indeed, these telephone calls became so frequent that Ms. Van Tine had to instruct her secretary to screen calls in order to minimize the harassment.

After the first meeting, Respondent Scheid was "friendly" but complained that Petitioner had a bad attitude, was rude and pushy, and
did not listen to what he had to say. Ms. Van Tine had the sense that Respondent Scheid was subtly requesting that Thomson be taken off the investigation.

After the second meeting, Respondent Scheid called her again to complain. This time his tone was more heated. He told her that all the people Scheid knew at Erie County Department of Human Services disliked Petitioner Thomson and that Van Tine should herself handle the investigation. Respondent Scheid called Petitioner "pushy, unprofessional, and son of a bitch."

After the third meeting, Ms. Van Tine met personally with Respondent Scheid. At this meeting, Respondent Scheid got quite angry and shouted that he did not like Thomson nor the way the agency was handling his case. He ordered Thomson off the case. Scheid told her that Huron County "doesn't pursue this kind of stuff" and he wanted to know why her Department needed to do so. Moreover, Scheid made it clear that if Thomson continued the investigation, Respondent Scheid would see to it that Petitioner Thomson would never progress professionally within the agency. Ms. Van Tine recalled his saying "don't try to be promoting him, don't bring any personnel actions out here, because he ain't going nowhere."

Following his third conversation with Respondent Scheid, Petitioner Thomson wrote a report, which was forwarded to the Erie County prosecutor's office in June, 1987 concluding:

> Briefly, the defendant [Respondent William P. Scheid], acting in his capacity as power-of-attorney, submitted two applications for Medicaid Program benefits and four subsequent yearly redetermination (of eligibility) forms to the Erie County Department of Human Services (ECDHS). Said applications were submitted for the purpose of obtaining Medicaid Program benefits for Ms. Scheid. The defendant [Respondent Scheid] did so knowing much of the information, provided by him and contained therein, to be false. [Respondent Scheid] specifically omitted declaring Ms. Scheid's true assets and income. Said action..., was done with a culpable state of mind and with the purpose of protecting his own personal interest in the estate of Ms. Scheid.

As the result of the Petitioner's investigation, Commissioner Scheid had to reimburse the County Medicaid program a total of $38,621.43. Also, the case was submitted to the Erie County Grand Jury for possible criminal prosecution.

Prior to the case being presented to the Grand Jury, director Van Tine became upset when Reid Meyers called her. Mr. Meyers was an attorney who often did work for Erie County Department of Human Services and the Erie County Board of Commissioners. He was also the brother of John Meyers, the special prosecutor, who had been appointed to present the Petitioner's investigation of Commissioner Scheid to the Erie County Grand Jury. Reid Meyers called Ms. Van Tine in response to a phone call he had received from Respondent Scheid. Respondent Scheid wanted Reid Meyers to speak to his brother in order to influence the case. Respondent Scheid made clear that "he was responsible for Meyers' contracts with Erie County and that Meyers was making lots of money from the Erie County contracts."

After the Erie County Grand Jury returned a "no bill" regarding Respondent Scheid, director Van Tine came under increasing criticism from County Commissioners including Respondent Scheid. Petitioner Thomson continued to press for additional avenues to prosecute Respondent Scheid such as filing a complaint with the Sandusky Municipal Court prosecutor or filing an individual taxpayer suit. However both Van Tine and DeWalt ordered him not to take such action.

In hopes of making peace with Respondent Scheid, director Van Tine discarded her plans to promote the Petitioner. She drafted a different job description than the one she had initially hoped to fill with the Petitioner. Van Tine admitted that this different position was drafted so as to deter Petitioner from submitting an application. After it was posted, Ms. Van Tine told the Petitioner not even bother applying for the position "since any effort would prove fruitless."

None of specific comments by Respondent Scheid or the reason for director Van Tine's changing the job description was disclosed to the Petitioner until January of 1989. At this time, Ms. Van Tine disclosed to Mr. Thomson the reasons for his being denied his promotion and the methods used by Respondent Scheid to retaliate and avoid prosecution. As a result, the

Petitioner contacted the Regional Office of the Inspector General of the U.S. Department of Health and Human Services reporting both the initial fraudulent activity, the cover-up, and the following retaliation by Scheid for Petitioner's conducting the investigation. The Inspector General opened an investigation and Ms. Van Tine testified to the above events leading to her decision to deny the Petitioner an opportunity for a promotion.

When Scheid and others at the agency including Catherine DeWalt learned of this investigation, new efforts of retaliation occurred against the Petitioner. His work environment became hostile and new restrictions were imposed to set him up to be discharged. Where his job description required him to:

> ...assists in criminal and civil prosecution through close cooperation with law enforcement officers, testifies when necessary; represents investigation unit in liaison with other agencies; helps establish procedures to conduct investigations and initiate corrective actions; attends meetings, conferences and training sessions and refers possible fraud cases to Assistant County prosecutor for decision on civil or criminal action...

he was ordered by Catherine DeWalt and the Department in a letter dated March 22, 1989:

> 3. The time clock is a reflection of the hours you work. You are to come into the agency to punch before commencing the work day and you are to return to the agency (if you are out on a home call) and punch out every afternoon. You are to punch in and out for <u>all</u> lunch periods. In other words, you are not authorized to be out of the building for such a period that you would not allow you to punch in and out for the day and for lunch periods.

> 4. You are not to travel out of county for any reason unless prior authorization is granted to you in writing....
>
> 5. You are not to talk to the media for any reason.
>
> 6. Unless specifically authorized, you are not to represent Erie County Department of Human Services when talking with other agencies, Prosecutor's office, Sheriff's Department, City Solicitor's office, etc. Should you be requested to discuss something on the phone or a meeting is requested, this should be referred to me. This includes the Toledo District office and State Auditor's office. All phone calls of this nature are to be referred to either me or the Agency Director.
>
> 10. ...All cases being referred to the Prosecutor, Municipal Court, etc., will be reviewed and authorized by me.

Thus, the agency stripped Mr. Thomson of his authority to come and go as he pleased and the discretion to conduct investigations as he saw fit. Ms. DeWalt began to remove his power and, with that, his ability to adequately perform his job. He was also instructed not to have any direct contact with any outside agency, including local/state/federal law enforcement and the county prosecutor. This particular restriction is directly contrary to Petitioner's job duties as described above in his position description.

Under this heightened scrutiny, all of Petitioner's activities were closely monitored and much of his conduct became suspect. He could not accomplish his job with these restrictions. He was disciplined for activities that had been routinely done in the past

and violated no written policy. In April of 1989, Linda Van Tine who had testified in the new Inspector General's investigation was forced out as the director of the Department. Several months later, trumped up charges were levied against Bennie Carrisalez, another friend of the Petitioner in the Department, causing her to be fired.

At that point, the Petitioner's working conditions had so deteriorated that he felt no alternative but to immediately find another job before the Respondents could cook up enough charges to discharge him. In October of 1989, Mr. Thomson accepted a position with the Ohio Auditors Office in Columbus.

Subsequently, Petitioner James Thomson, filed suit against Respondents Scheid, Erie County Department of Human Services, and DeWalt under 42 U.S.C. §1983 for violation of due process, both substantive and procedural, and retaliatory conduct in violation of the First Amendment. The United States District Court for the Northern District of Ohio granted respondents motion for summary judgment.

On November 8,1991 Respondent filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit. Appellate Jurisdiction was based on 28 U.S.C. §1291. The case was argued before the Sixth Circuit Court of Appeals on August 13, 1992. The panel, per Judge Kennedy, issued its opinion October 19, 1992.

The Circuit opinion affirmed the District Court's grant of summary judgment, held as a matter of law that the First Amendment does "not extend to [public employee's] speech made in the course of acting as a public employee". Thomson v. Scheid, 977 F.2d 1017, 1020 (6th Cir. 1992).

Petitioner Thomson now seeks review of this holding which not only raises an important and frequently recurring issue of public significance regarding the extent of the freedom of speech guaranteed to more than sixteen million governmental employees by the First Amendment to the United States Constitution, but also creates a conflict between Circuit Courts of Appeals.

REASONS FOR GRANTING THE WRIT

This case presents for review a specific question of overriding importance which has not been addressed by this Court and which has created a conflict between the United States Courts of Appeal: whether speech of a public employee is per se exempted from First Amendment protection if the speech was made in the course of the employee's official duties.

In this case the United States Court of Appeals for the Sixth Circuit held that Petitioner Thomson had failed to demonstrate that he spoke out on a matter of public concern solely because his exposure of alleged corruption by an elected government official, Respondent Scheid, occurred within the course of his employment. This holding is in direct conflict with decisions of two other circuit courts of appeals. See, Koch v. City of Hutchinson, 847 F.2d 1436 (10th Cir. 1988), and Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983). In addition, the decision of the Sixth Circuit in the instant case is in serious tension with the holdings of numerous other federal appellate courts that government employee speech addresses a matter of public concern and is therefore presumptively entitled to First Amendment protection precisely because it exposes governmental corruption or official wrongdoing. See, e.g., Vasbinder v. Ambach, 926 F.2d 1333 (2d Cir. 1991); Thomas v. Douglas, 877 F.2d 1428 (9th Cir. 1989); O'Donnell v. Yanchulis, 875 F.2d 1059 (3d Cir. 1989).

Although the state of the law on the specific issue presented for review by this case is unsettled, the basic framework established by this Court for analyzing whether a government employee's speech is protected by the First Amendment to the United States Constitution is well-established. A person no longer wholly forfeits his First Amendment right to freedom of speech by virtue of the mere fact that he is a government employee. See, e.g., Rankin v. McPherson, 483 U.S. 378 (1987); Perry v. Sinderman, 408 U.S. 593 (1972); Pickering v. Board of Education, 391 U.S. 563 (1968). This constitutionally

protected freedom of speech is not lost by the government employee merely because the communication occurs within the workplace: "[A] public employee [does not] forfeit[ ] his protection against governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly." Givhan v. Western Line Consolidated School District, 439 U.S. 410, 414 (1979). See also Rankin v. McPherson, supra at 386-87 n. 11. This Court also has established that the First Amendment interest of a government employee in exercising his right of freedom of speech may be abridged by governmental actions short of discharge, including the denial of promotion or other employment discipline. Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990).

This case does not implicate this Court's recognition that the government in its capacity as an employer has unique interests in maintaining efficiency, discipline, and morale in the workplace which are not present in cases addressing the First Amendment rights of private citizens. In cases involving the First Amendment freedom of speech rights of government employees, it is necessary to arrive "at a balance between the interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Connick v. Meyers, 461 U.S. 138, 140 (1983), quoting Pickering v. Board of Education, supra at 568. Petitioner does not question the need for such balancing. His complaint is that the courts below did not reach this stage of the analysis due to their improper invocation of per se rule.

This case presents the specific and important question of the proper interpretation of this Court's threshold inquiry in the Pickering balancing test, whether the government employee's speech may be "fairly characterized as constituting speech on a matter of public concern." Connick, supra at 146. See also Rankin v. McPherson, supra at 384-85.

In Connick, this Court attempted for the first and last time to define what constitutes "a matter of public concern." Initially,

"a matter of public concern" was deemed to be "any matter of political, social or other concern to the community." Connick, supra at 146. This Court also contrasted "matters of public concern" with "matters only of personal interest", Id. at 147, and stated that "mere extensions of a [personnel] dispute" are not "matters of public concern". Id. at 148. Furthermore, Connick contrasted two situations to illustrate the meaning of its threshold test: "when a public employee speaks. . . as a citizen upon matters of public concern" versus when the communication is made "as an employee upon matters only of personal interest." Id. at 147. Connick then gave examples of speech which does not address matters of public concern: "questions pertaining to the confidence and trust that [government employees] possess in various supervisors, the level of office morale, and the need for a grievance committee. . . ." Id. at 148. Examples of "matters of public concern" also were set forth in Connick: "questions of public import in evaluating the performance of . . . an elected official", statements "inform[ing] the public that the . . . [o]ffice was not discharging its governmental responsibilities", and statements "seek[ing] to bring to light actual or potential wrongdoing or breach of public trust on the part of a [government official]". Id. Finally, Connick held that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Id. at 147-48.

Unfortunately, Connick's definitions and "descriptions of public concern provided just enough guidance to confuse everyone." Smith, Beyond "Public Concern": New Free Speech Standards for Public Employees, 57 U. CHI. L. REV. 249, 258 (1990). See also Lee, Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement, 76 CALF. L. REV. 1109, 1126 (1988) ("the scope of public concern is unclear"); Massaro, Significant Silences: Freedom of Speech in the Public Sector Workplace, 61 S. CALF. L. REV. 1, 4 (1987) ("the 'matter of public concern' restriction is vague").

This confusion is exacerbated by the fact that in the ten years

since Connick there has been no further attempt to define this threshold "matter of public concern" requirement by this Court, although it has been applied once in the case of Rankin v. McPherson, supra. Thus, the lower courts have been left to develop their own interpretations of the proper meaning and application of the "matter of public concern" test enunciated by this Court. Simply stated, there is no consistency between the Federal Circuit Courts of Appeal on this critical issue of paramount importance to the twenty per cent of the workforce who are employed by the government and the general public who relies on government employees' unique access to information regarding the performance of government agencies and officials.

Some Circuit Courts of Appeal have held that a government employee's speech addresses a matter of public concern if it is "helpful to the public in evaluating the conduct of government." Koch v. City of Hutchinson, 847 F.2d 1436, 1447 (10th Cir. 1988). See also Ferrara v. Mills, 781 F.2d 1508, 1514 (11th Cir. 1986); McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983). The United States Court of Appeals for the Eight Circuit has gone further and inquired whether public debate has actually occurred on the subject. Lewis v. Harrison School District, 805 F.2d 310 (8th Cir. 1986).

Other Circuit Courts of Appeal have focused not on the subject matter of the speech involved but instead on the motive of the government employee. See, e.g., Morales v. Stierheim, 848 F.2d 1145, 1149 (11th Cir. 1988); Callaway v. Hafeman, 832 F.2d 414, 417 (7th Cir. 1987); Gomez v. Texas Department of Mental Health, 794 F.2d 1018, 1022 (5th Cir. 1986). In contrast the United States Court of Appeals for the Third Circuit explicitly has repudiated reliance on motive as the sole controlling factor in assessing the character of the government employee's speech. Zamboni v. Stamler, 847 F.2d 73 (3d Cir. 1988), cert. denied, 488 U.S. 899 (1989).

The United States Court of Appeals for the Fourth Circuit has taken yet a different approach on this issue:

The principle that emerges is that all public employee speech that by content is within the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely "personal concern" to the employee - most typically, a private, personnel grievance. Berger v. Battaglia, 779 F.2d 992, 998 (4th Cir. 1985 (emphasis in original). And in this case, the Sixth Circuit totally ignored the content of the speech and focused solely on the context, i.e., that it occurred during the course of the employee's duties. The subject matter of the speech, corruption by a public official, was not considered.

The United States Court of Appeals for the Ninth Circuit has best summarized the current state of the law:

[T]he [United States] Supreme Court has not articulated a precise definition of "public concern," however. It has allowed only that the determination of whether an employee's speech deals with such an issue is to be made with reference to the "content, form, and context" of the speech. Allen v. Scribner, 812 F.2d 426, 430, modified, 828 F.2d 1445 (9th Cir. 1987), quoting Connick, supra at 147-48.

The public interest in this Court's ending the lower court's confusion regarding the proper definition of what constitutes a "matter of public concern" is compelling. A lexis search reveals that the Federal Courts of Appeal have decided literally hundreds of cases raising this critical threshold issue in the ten years since this Court's enunciation of this test in Connick v. Meyers, supra. Consistency regarding the proper outcome of these recurring cases is essential because of their impact on the paramount First Amendment right of freedom of speech and because in each case the career and perhaps even the very livelihood of a government servant is at issue.

The instant case presents for review an ideal vehicle for this Court's resolution of this important issue. The decision of the United States Court of Appeals for the Sixth Circuit in this case that a government employee's exposure of alleged corruption by an elected official is per se not a matter of public concern if the

employee's speech occurred within the course of his employment is in direct conflict with decisions of two other circuits. See Koch v. City of Hutchinson, 847 F.2d 1436 (10th Cir. 1988) and Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983).

This case also presents an ideal case for review precisely because the decision of the court below represents the worst conceivable interpretation of the threshold "matter of public concern" requirement for First Amendment protection for speech of government employees. Indeed, the Sixth Circuit's decision is directly contrary to one of the primary purposes of the freedom of speech clause of the First Amendment to the United States Constitution:

> [T]he purpose of the First Amendment includes the need . . . 'to protect parties in the free publication of matters of public concern, to secure their right to free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them.'

Wood v. Georgia, 370 U.S. 375, 392 (1962), quoting 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 885 (8th ed. 1927). See also Butterworth v. Smith, 494 U.S. 624 (1990); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times v. Sullivan, 376 U.S. 254 (1964).

The Sixth Circuit's interpretation of the public concern threshold test also is incompatible with the basic framework of the Pickering balancing test since it undercuts this Court's recognition both of the importance of government employee's speech as a means of exposing governmental corruption, Connick, supra at 148, and the government's legitimate interest as an employer in maintaining discipline and efficiency in the

workplace. Rankin v. McPherson, supra at 384; Connick v. Meyers, supra at 140; Pickering v. Board of Education, 391 U.S. at 568. Under the Sixth Circuit's rule that a government employee who exposes corruption in the course of his employment forfeits all First Amendment protection, only those government employees who are insubordinate or violate a rule or regulation of the workplace will be entitled to protection for their expression under the Constitution. For instance, under the lower court's analysis, only if Petitioner had gone outside the approved channels for his communication could he be protected by the First Amendment from retaliation by the target of his investigation. Not only does this interpretation of the matter of public concern test provide precisely the wrong incentives to government employees, it threatens to deprive law enforcement officials, who ordinarily are authorized in the ordinary course of their employment to investigate any and all suspected criminal activity in their jurisdiction, of all First Amendment protection.

The decision of the Sixth Circuit thus diminishes the ability of public entities to police themselves and detect internal corruption. Petitioner Thomson in this case was denied a potential promotion and disciplined precisely because he chose to carry out his public employment duties in a conscientious and diligent manner. The interest of the public is fundamentally disserved by a rule of law that discourages efficiency by government employees in rooting out official corruption and wrongdoing. Petitioner Thomson could have exercised his discretion and overlooked the alleged improprieties of Respondent Scheid. Petitioner Thomson should not forfeit his constitutional protection for his speech on a matter of utmost public interest simply because he chose to work within the rules and regulations set forth by his government employer.

In contrast to the holdings of other circuit courts of appeals in Koch v. City of Hutchinson, supra, and Egger v. Phillips, supra, the Sixth Circuit's decision in this case effectively immunizes from public exposure corrupt government officials who have the authority to impede official internal investigations.

By so holding, the Sixth Circuit has impaired the legitimate interest of governmental institutions in "promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service." Ex Parte Curtis, 106 U.S. 371, 373 (1882).

The decisions below demonstrate the confusion surrounding the "matter of public concern" issue. It also demonstrates the potential for courts to adopt rules that discourage public employees from performing their duties in a manner that best serves the public and the need for this Court to provide guidance on this important question.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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March 1993

A 1

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 91-4060

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES THOMSON,
Plaintiff-Appellant,

v.

WILLIAM P. SCHEID, Individually, and in his Official Capacity as Erie County Commissioner; ERIE COUNTY DEPARTMENT OF HUMAN SERVICES; CATHERINE R. DEWALT, in her Official Capacity as Income Maintenance Administrator, Erie County Department of Human Services,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed October 19, 1992

Before: KENNEDY and JONES, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

KENNEDY, Circuit Judge. Plaintiff James Thomson appeals the order of the District Court granting summary

BEST AVAILA

judgment in favor of defendants William P. Scheid, Catherine R. DeWalt, and Erie County Department of Human Services in this 42 U.S.C. § 1983 action. For the reasons to follow, we AFFIRM.

I.

Plaintiff was hired by the Erie County Department of Human Services (the "Department") in January, 1987 as a fraud investigator. He was responsible for investigating suspected fraud by recipients of public funds in the programs administered by the Department. Shortly after he was hired, plaintiff was assigned to investigate Erie County Commissioner William Scheid because the Department had received an "Income Eligibility Verification System (IEVS) Match," which indicated that Scheid's elderly aunt had additional income which was not disclosed to the Department on her Medicaid application and redetermination forms. Scheid held power of attorney for his aunt and had filled out the forms. Plaintiff reviewed documents in the case file and interviewed Scheid. During the investigation, Scheid called Linda Van Tine, the Director of the Department, several times to complain about plaintiff. Plaintiff wrote a report which was forwarded to the Erie County prosecutor in June, 1987. A special prosecutor referred the case to a grand jury, which returned a "no bill." After the grand jury deliberations, plaintiff informed the Office of Inspector General, United States Department of Health and Human Services ("OIG") of his investigation of Scheid. OIG Agent George Debrovic, who had been working with the Department on a joint federal and county task force, investigated the Scheid case. Plaintiff also contacted the Federal Bureau of Investigation ("FBI"). Plaintiff wanted to personally file charges against Scheid, but Catherine DeWalt, plaintiff's supervisor, and Van Tine reminded plaintiff that he was bound by Department confidentiality rules and warned him not to act without following Department policies and procedures. No charges against Scheid were brought by the United States Attorney and plaintiff did not file a complaint.

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After the Scheid investigation ended, plaintiff and Van Tine had discussions about a new supervisory position that might be created within the Department for which Van Tine thought plaintiff was qualified. Van Tine had exclusive responsibility for determining the job classification of a new supervisory position. The position as discussed would have required shifting of organizational structure and would have involved two different sources of funding within the Department. When the position was eventually created, Van Tine did not write the job description as she had originally discussed with plaintiff. The job description, as written, conformed to a state defined position, required for state approval. Although plaintiff met all the requirements of the position, he did not apply when it was posted. Van Tine now claims that she wrote the job description differently because Scheid told her that he would not permit plaintiff to be promoted.

Plaintiff resigned from the Department on October 6, 1989, because he felt that his work conditions had so deteriorated that he had no alternative. Plaintiff claims that a written reprimand issued by DeWalt undermined his power to conduct his investigations and his ability to adequately perform his job. He accepted a position with the State of Ohio in Columbus at a higher rate of pay, although he had to be away from his family from Monday to Thursday.

Plaintiff brought this action under 42 U.S.C. § 1983 against Scheid, individually and in his official capacity as a county commissioner, the Department, and DeWalt, in her official capacity as plaintiff's supervisor. Plaintiff alleged that he had been denied substantive due process and that he suffered retaliation for exercising his First Amendment rights. Plaintiff moved for partial summary judgment which was denied. Defendants DeWalt and the Department, together, and Scheid, separately, filed motions for summary judgment which were granted by the District Court.

II.

We review a grant of summary judgment *de novo*, making all reasonable inferences in favor of the non-moving party. *EEOC v. University of Detroit*, 904 F.2d 331, 332 (6th Cir. 1990). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986).

Plaintiff argues that the District Court erred in finding that plaintiff had no entitlement to his job or to a promotion based on substantive due process. Substantive due process protects fundamental interests, not state-created contract rights. *Charles v. Baesler*, 910 F.2d 1349, 1353 (6th Cir. 1990). Absent the infringement of a fundamental right, the termination of public employment does not constitute a denial of substantive due process. *Sutton v. Cleveland Bd. of Educ.*, 958 F.2d 1339, 1351 (6th Cir. 1992). Plaintiff's position as an investigator for the Department was created by state law. Therefore, even if plaintiff could show that he was constructively discharged because his work conditions were intolerable, his claim would not implicate substantive due process protections. Any interference with conditions or terms of employment is adequately redressed in a state breach of contract action. *Charles*, 910 F.2d at 1355. Plaintiff also argues that he was denied a promotion because Van Tine changed the job description on the newly created supervisory position because Scheid told her that plaintiff could not receive the promotion. Even if plaintiff's allegation is true, the right to a promotion is not a fundamental interest protected by substantive due process. *Id.* at 1353.

Plaintiff also claims that he was deprived of a liberty interest because defamatory statements were made against him. Defamatory statements were allegedly made by Scheid to Van Tine during plaintiff's investigation of Scheid, and by DeWalt following plaintiff's resignation to

the man hired to replace plaintiff. Defamatory statements alone do not constitute a deprivation of liberty guaranteed by the Fourteenth Amendment. *Paul v. Davis*, 424 U.S. 693, 711-12 (1976). Where a plaintiff alleges deprivation of liberty because he was defamed in the course of his employment, to be actionable under the Fourteenth Amendment the defamation must occur in the course of the termination of employment. *Id.* at 710 (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972)). Here, Scheid's purported statements were made during plaintiff's investigation, two years before plaintiff resigned, and DeWalt's statements were made after plaintiff resigned. It cannot be said that any defamatory statements affected the termination of plaintiff's employment.

Plaintiff argues that the defendants violated his procedural due process rights. However, plaintiff did not raise a procedural due process claim in the District Court, and this Court declines to hear arguments not initially presented in the District Court. *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 243 (6th Cir. 1991).

Plaintiff's final argument is that the District Court erred in finding that plaintiff's investigation did not constitute speaking out on an issue of public concern and did not warrant First Amendment protection. First Amendment protection extends to a public employee's speech when he speaks as a citizen on a matter of public concern, but does not extend to speech made in the course of acting as a public employee. *Connick v. Myers*, 461 U.S. 138, 147 (1983). Not all matters discussed within a government office are of public concern, and thus internal office communication does not necessarily give rise to a constitutional claim. *Id.* at 149. Here, plaintiff argues that the nature of his investigation, alleged fraud by a public official, was a matter of public concern because "[p]ublic interest is near its zenith when ensuring that public organizations are being operated in accordance with the law." *Marohnic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1986). He claims that his conversations with DeWalt and Van Tine about his investigation, what he felt was a

"cover-up" by the grand jury, and his desire to pursue the Scheid case amounted to speaking out on matters of public concern. We find that plaintiff's conversations with DeWalt and Van Tine about the investigation, their reminder to plaintiff that his investigation was confidential, and their warning not to pursue the matter without going through appropriate Department procedures concern plaintiff's duties as an employee of the Department. Therefore, these conversations concern matters of internal department policy and cannot be considered speaking out on matters of public concern.

We further find that plaintiff's conversations with OIG Agent Debrovic do not amount to speaking out on matters of public concern. Plaintiff informed Van Tine that he intended to contact federal officials prior to his initial conversation with Agent Debrovic, and Van Tine authorized him to do so. DeWalt also was aware that he was contacting federal officials. Van Tine and DeWalt also knew that plaintiff gave the OIG a copy of his report on the Scheid investigation. Because plaintiff's contact with the OIG was approved by his supervisors, we believe that plaintiff was acting in the course of his employment in his conversations with the OIG. He therefore was not speaking out as a citizen with regard to his investigation, and his conversations with the OIG are not protected by the First Amendment. Because plaintiff did not speak out on a matter of public concern, his statements are not protected by the First Amendment, and we need not review his decision to resign to determine whether he was retaliated against.

Plaintiff also contacted the FBI, who told him that they could not become involved without a request from the county prosecutor. Plaintiff's supervisors were not aware that he had contacted the FBI. Plaintiff did not tell anyone that he had spoken with the FBI until his deposition was taken on January 3, 1991. Even if plaintiff's contact with the FBI could be considered speaking out as a citizen, he cannot claim that he was retaliated against for contacting the FBI because the

defendants did not learn of this contact until after he had resigned.

III.

We therefore conclude that defendants are entitled to summary judgment as a matter of law, and we AFFIRM the District Court.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHER DISTRICT OF OHIO
WESTERN DIVISION

JAMES THOMSON,

Case No. 3:90CV7166

Plaintiff(s),

-vs- OPINION AND ORDER

WILLIAM P. SCHEID, etc., et al.,

Defendant(s).

WALINSKI, J.

This matter is before the Court on defendants' motions for summary judgment and plaintiff's opposition thereto. Jurisdiction by this Court is pursuant to 28 U.S.C. §1331.

BACKGROUND

James Thomson ("Thomson") was employed by the Erie County Department of Human services ("ECDHS") as a fraud investigator from January 6, 1987 to October 6, 1989. His responsibilities within that position included field and in-house investigations of suspected fraud of public funds within the programs administered by ECDHS.[1] His duties also included maintaining investigative records and assisting with prosecutions in conjunction with law enforcement officials. Under Thomson's job description, his immediate supervisor was the

[1] The public assistance programs subject to investigations of suspected fraud included the Food Stamps, Medicaid, Aid to Families with Dependent Children ("ADC") and General Assistance ("GA").

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Income Maintenance Supervisor 2. During the time Thomson was employed by ECHDS, the Income Maintenace Supervisor 2 was Catherine DeWalt ("DeWalt").

In February 1987, a fellow ECDHS worker discovered an income Eligibility Verification System ("IEVS") match[2] regarding Edna Scheid, defendant William P. Scheid's ("Scheid") aunt. Usually an IEVS match was passed on to the proper income eligibility worker who would check the information contained within the match against the client's file. Where the case worker verified the targeted data, a determination was made as to whether this constituted unreported income sufficient to render the client ineligible and whether an overpayment by the agency had occurred. It was not unusual for the fraud investigator to aid the case worker in obtaining data verification.

Where an overpayment was indicated, the determination was reviewed by the Income Maintenance Administrator and passed onto the fraud investigation unit for collection and/or referral to the county prosecutor for possible prosecution.

The match was brought to the attention of ECDHS director, Linda Van Tine ("Van Tine") as Scheid was an County Commissioner for Erie County.[3] Both Thomson and the caseworker apparently spoke with Van Tine regarding this situation bypassing the normal chain of command[4]and were advised to follow standard procedures.

Thereafter, Thomson, in the course of his investigation proceeded to interview Scheid on three separate occasions in an effort to verify the income information targeted. During this

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[2] IEVS matches are achieved by tracking client information by computer within various governmental agencies.

[3] It is undisputed that William Scheid possessed a power of attorney for Edna Scheid and completed the application for Medicaid benefits.

[4] While defendant ECDHS acknowledges that there was no formal procedure existed regarding IEVS investigations where public officials were involved, clearly within his job description and pursuant to the personnel manual, Thomson was required to report first to his immediate supervisor, namely DeWalt. See, Fraud Investigator Job Description and ECDHS Personnel Manuel at p.8.

investigation, Thomson asserts that both Van Tine and DeWalt advised him to proceed carefully and intimated that Scheid might retaliate against him as a result of the investigation.

In June 1987 Thomson submitted his report to the Erie County Prosecutor. However, a special prosecutor was appointed to investigate the matter and presented it to the County Grand Jury. The Erie County Grand Jury returned a "no bill" which Thomson alleges was the result of a coverup. At that point, both DeWalt and Van Tine testified that Thomson indicated his desire to file an individual taxpayer suit against Scheid but was advised not to proceed as such.

Van Tine testified in her deposition, that during the course of the Scheid investigation, she had two conversations with Scheid regarding Thomson. The first conversation was during a phone call in which Scheid allegedly expressed his displeasure regardiing Thomson's handling of the IEVS match investigation. Van Tine Dep. at 55. After the Grand Jury convened, Scheid, in a face to face meeting with Van Tine allegedly stated that he did not want Thomson promoted. Id. at 58. Thereafter, Van Tine recalls no further discussions with Scheid regarding plaintiff.

At the end of 1987, Van Tine testified that she had several discussions with Thomson regarding the creation of a new position which would combine an investigator and supervisory position. Van Tine testified that at no time did she promise him the potential position and this is corroborated by both plaintiff and DeWalt's testimony.

In December 1988 the position for Child Support Enforcement Agency ("CSEA:) Investigation Supervisor was posted and subsequently filled in January 1989 by someone other than Thomson. It is not disputed that the position posted and the one discussed by Van Tine with Thomson differed. In addition, it is undisputed that Thomson did not apply for the position.

In March 1989, Thomson received a formal reminder from DeWalt regarding policies and procedures of ECDHS. On July 19, 1989, Thomson was given a written reprimand for insubor

dination, failure of good behavior and by-passing the chain of command regarding a credit report. Thereafter, on October 10, 1989, Thomson resigned his position at ECDHS and accepted a position with the State of Ohio Auditor's Office as an investigator.

Thomson initiated this civil rights suit under 42 U.S.C. §1983 against Scheid, ECDHS, and DeWalt for declaratory, injunctive and compensatory relief. Specifically, Thomson's complaint alleges that his due process rights under the Fourteenth Amendment were violated by defendants' alleged unwarranted discipline, restriction in job duties, denial of promotion, and defamation of his reputation as a result of his investigative efforts in the Scheid matter. Second, plaintiff asserts that his rights under the First Amendment, namely freedom of speech, were violated as defendants' allegedly retaliated against him as stated previously.

Defendants, Scheid, ECDSH, and DeWalt now move for summary judgment.

DISCUSSION

Rule 56, Fed. R. Civ. P., directs the disposition of a motion for summary judgment. In relevant part Rule 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Court's function in ruling on a motion for summary judgment is to determine if any genuine issue exists for trial, not to resolve any factual issues, and to deny summary judgment if material facts are in dispute. United States v. Articles of Device, 527 F.2d 1008, 1011 (6th Cir. 1976); Tee-Pak, Inc. v. St. Regis Paper Co., 491 F.2d 1193, 1195 (6th Cir. 1974). Further, "[i]n ruling on a motion for summary judgment, the evidence must be

viewed in a light most favorable to the party opposing the motion." Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1324 (6th Cir. 1983). To summarize, summary judgment is only appropriate when no genuine issue of material fact remains to be decided, and when the undisputed facts, viewed in a light most favorable to the non-moving party, entitle the movant to judgment as a matter of law. Smith v. Pan Am World Airways, 706 F.2d 771, 773 (6th Cir. 1983).

A principle purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Rule 56(e) places responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence of a material question of fact or that the underlying substantive law does not permit such a decision. In relevant part the provision states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P. Rule 56(e) requires the non-moving party to go beyond the pleadings, and by affidavits, depositions, answers to interrogatories, or admissions on file, designate specific facts showing a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. at 324.

Under 43 U.S.C. §1983, plaintiff must demonstrate that defendants were actinig under color of state law, that plaintiff was deprived of a constitutional right and that the deprivation was caused by the defendant's action or inactions. Monell v. Department of Social Services, 436 U.S. 658 (1978). Plaintiff

has alleged violation of his substantive due process rights under the First and Fourteenth Amendments. Substantive due process guarantees that no person shall be arbitrarily or unreasonably deprived of life, liberty, or property. See, Harrah Independent School District v. Martin, 440 U.S. 194 (1979).

As a preliminary matter, the Court notes that within his opposition plaintiff withdraws his due process claim regarding the alleged denial of job promotion. Instead, Thomson states that he was constructively discharged by virtue of defendants' disciplinary actions, alleged restriction of duties, no opportunity for advancement and derogatory comments and accordingly was denied substantive due process under the Fourteenth Amendment.

Constructive discharge exists where the working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. Yates v. Avco Cop., 819 F.2d 630 (6th Cir. 1987). This requires inquiry into both 1) the objective feeling of the employee and 2) the intent of the employer based upon reasonably foreseeable impact. Id. While Yates dealt with a claim alleging sexual harassment under 42 U.S.C. §2000(e) et seq., the Sixth Circuit has applied the theory of constructive discharge outside the purview of §2000(e). See, Kreis v. Charles O. Townley, M.D. & Associates P.C., 833 F.2d 74 (6th Cir. 1987)(ERISA case wherein constructive discharge analysis undertaken as a predicate for determining involuntary exclusion from retirement plan).

In addition, at least one district court within this circuit has also undertaken a constructive discharge analysis regarding a §1983 claim but clearly stated that:

> As a threshold matter, the Court finds that plaintiff is not barred from alleging a constructive discharge in order to establish his claims under §1983. Plaintiff is not bringing a constructive discharge claim per se, but is alleging a constructive discharge as a predicate to his §1983 claims.

Meyers v. Cincinnati, 728 F.Supp. 477, 482 (S.D. Ohio 1990), aff'd in part and rev'd in part 934 F.2d 726 (6th Cir. 1991) (emphasis in original and emphasis added). The §1983 claim by plaintiff in Meyers alleged a violation of procedural due process. Plaintiff submits no case under which a court has undertaken a §1983 substantive due process claim and subjected it to a constructive discharge analysis.

Most recently, the Sixth Circuit in Charles v. Baesler, 910 F.2d 1349 (6th Cir. 1990) discussed the nature of substantive due process as it relates to an alleged property interest based upon an employment contract. In Baesler, the plaintiff was a fire department captain who alleged that he had a substantive due process right to a promotion based upon his employment contract. In rejecting that argument the court stated:

> Most, if not all, state-created contract rights, while assuredly protected by procedural due process, are not protected by substantive due process. The substantive Due Process Clause is not concerned with the garden variety issues of common law contract. Its concerns are far narrower, but at the same time, far more important. Substantive due process "affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' (Citations omitted).

Id. at 1353. (Emphasis added).

Thomson relies upon two Supreme Court cases for the proposition that a protected property interest in employment exists when the employee has a legitimate claim of entitlement to continued employment. See, Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972). While this proposition is generally true, it pertains specifically to procedural due process. See, Bishop v. Wood, 426 U.S. 341 (1976); Cleveland Bd. of Education v. Loundermill, 470 U.S. 532 (1985); Seltzer v. Cuyahoga County Dept. of Human

Services, 38 Ohio App. 3d 121, 528 N.E.2d 573 (1987)(classified civil servant has property right in continued employment regarding procedural due process).

In addition, plaintiff's reliance upon the Sixth Circuit's footnote in Baesler,[5] is not persuasive as it was noted within the court's discussion of the Equal Protection Clause. Baesler, supra at 1356. Plaintiff makes no such equal protection argument here.

Plaintiff resigned his position and procured employment with the State of Ohio at a higher rate of pay. Therefore, his claims that he was allegedly defamed have no merit as they did not prevent him from securing employment. See, Codd v. Velger, 429 U.S. 624 (1977). In addition, alleged defamation is not a liberty interest protected by the Fourteenth Amendment. Paul v. Davis, 424 U.S. 693 (1976). Therefore, while plaintiff has a legitimate claim of entitlement to his job where procedural due process is involved, the same cannot be said regarding claims based upon substantive due process. Finding that plaintiff has not shown that he was deprived of a constitutional right a prima facie case under §1983 cannot be shown and the Court need not consider whether a constructive discharge analysis applies. Accordingly, the Court finds defendants' motion well taken as to the first cause of action.

Defendants also seek summary judgment regarding plaintiff's claims based upon his First Amendment rights. Thomson alleges that defendants engaged in retaliatory actions in return for exercising his first amendment rights, namely freedom of speech.

The test for whether a public employer has violated an employee's First Amendment rights requires a balancing of: 1)

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[5] We note that as an aside that discriminatory administration of contractual public employment rights may implicate substan tive due process as well as equal protection concerns, even if the liberty or property interest involved cannot be deemed independently fundamental. In such situations, substantive due process and equal protection doctrine overlap.... Baesler, at 1356 n.**.

the interests of the employee as a citizen in commenting on matters of public concern versus 2) the interests of the State or employer in promoting the efficiency of the public service which it seeks to perform through its employees. Rankin v. McPherson, 483 U.S. 378, 384 (1987).

The Supreme Court has stated that protection under the First Amendment is accorded to a public employee speaking out as a public citizen on matters of public concern. Connick v. Myers, 461 U.S. 138 (1983). Likewise, where an employee speaks out on a matter of personal interest, "absent the most unusual circumstances", a federal forum is not appropriate to review the wisdom of personnel decisions which are allegedly reactionary. Id. at 147. It is a matter for the court to review the content, form and context of the speech. Id. See, also, Rankin, supra.

There is no dispute that Thomson's investigation was on behalf of the agency and involved alleged Medicaid overpay ments. In addition, there is no dispute that Thomson, as the other ECDHS employees undertook their duties under an expresss rule of confidentiality.[6]

Plaintiff argues that because his investigation involved public money which was alleged to be fraudulently obtained and an elected public official, the public concern requirement is met. However, the Court disagrees. First, plaintiff has not demonstrated that he effectively spoke out on a matter of public concern. While it is true that he undertook the Scheid investigation, he was required to do so as per his job description. In addition, plaintiff's investigation, by his own admission, was

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[6] Cases are not to be discussed where the information can be overheard by the public or other Agency employees not associated with the case. No case documents, etc., are to be shared with the public nor other AGency employees/units not associated with the case. Intra-agency requests, i.e. Social Service Department and Income Maintenance Department, for case file information is to be coordinated between the Administrators or through the Agency Director.

Case information is not to be discussed outside the office.

ECDHS Personnel Manual at p.15.

not restricted in any way and he was instructed to proceed as normal. As the Court stated in Connick:

> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark--and certainly every criticism directed at a public official--would plant the seed of a constitutional case.

Id. at 149. While the case in Connick dealt with a survey circulated by an employee, the Court's discussion of what constitutes public concern is worth noting.

Taking into consideration those factors laid out by the Court in Connick, Thomson's investigation does not constitute speaking out on an issue of public concern sufficient to warrant protection under the First Amendment. See, McMurphy v. City of Flushing, 802 F.2d 191 (6th Cir. 1986). Accordingly, Thomson's claim of retaliation is not addressed as he is not found to have been speaking out on an issue of public concern. Defendants' motion as to the second cause of action is well taken.

In summary, the Court finds that no material facts are in dispute, and that even when viewing all inferences in the light most favorable to the plaintiff, as a matter of law, summary judgment is proper. While the Court finds that plaintiff, as a matter of law has no viable federal claims, the Court declines to exercise its jurisdiction to consider whatever state claims remain. See, United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Therefore it is

ORDERED that defendants' motions for summary judgment is granted.

NICHOLAS J. WALINSKI
Senior U.S. District Judge

TOLEDO, OHIO
October 7, 1991

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 92-1526

IN THE

Supreme Court of the United States

October Term, 1992

JAMES THOMSON,
Petitioner,

vs.

WILLIAM P. SCHEID, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS WILLIAM P. SCHEID, ERIE COUNTY DEPARTMENT OF HUMAN SERVICES AND CATHERINE R. DEWALT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

Whether the opinion of the court below, affirming the district court's award of summary judgment to the Respondents, creates a direct conflict among the courts of appeals so as to necessitate resolution by this Court of the First Amendment issues determined below.

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JAMES THOMSON,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS WILLIAM P. SCHEID, ERIE COUNTY DEPARTMENT OF HUMAN SERVICES AND CATHERINE R. DEWALT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Respondents do not contest the Statement of Opinions of the United States District Court for the Northern District of Ohio and of the United States Court of Appeals for the Sixth Circuit set forth in the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The Respondents do not contest the statement of jurisdictional grounds set forth in the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Respondents do not dispute the Petitioner's statement of the constitutional provision and the statute which must be considered in connection with this case.

STATEMENT OF THE CASE

Petitioner is a historically litigious former employee of Erie County, Ohio. In his Statement of the Case, he weaves a sinister tale of intrigue and conspiracy. However, in large part, it is a creation of his imagination rather than a fair summary of the record. Neither the district court nor the court of appeals found support for much of Petitioner's story. *See Thomson v. Scheid,* 977 F.2d 1017, 1019 (6th Cir. 1992). Most importantly, much of Petitioner's statement is irrelevant to the First Amendment claim that he now presses.

Petitioner was hired by the Erie County Department of Human Services in early 1987 and worked there as a fraud investigator for approximately two and one-half years. In 1989, the administrator of the Department of Human Services, Linda Van Tine, left her position with a great deal of animosity toward the Erie County Commissioners. At the time of her departure, she told Petitioner that, during her tenure, she had prepared a job description for a new position within the Department in a way that would disqualify him. These claims by the disgruntled former administrator, as well as Petitioner's long time job frustrations[1], provided the background for this action.

The former administrator claimed that she had modified the job description to exclude Petitioner because of an occasion, soon after Petitioner started working for the Department, when Petitioner had

[1] Petitioner had previously been a sheriff's deputy in Huron County, Ohio. He preferred the freedom that he had with the sheriff's department to the regulation-bound work environment of the Department of Human Services (R. 30: Thomson dep. 107-109, 115). Although Petitioner liked investigative work, the Erie County prosecutor made it clear to Petitioner that prosecution of welfare fraud was not a high priority.

investigated Respondent William P. Scheid, an Erie County Commissioner. On that occasion, Petitioner was assigned to investigate whether Scheid had misstated the assets of a relative for whom he held a power of attorney in an application for Medicaid benefits. After Petitioner had completed his investigation and submitted his report, the issue was presented to the grand jury which returned a "no bill".[2] In April, 1989, the disgruntled former administrator said that Scheid had been unhappy with the way Petitioner conducted the 1987 investigation. She claimed that Scheid referred to Petitioner as "pushy, unprofessional, and son of a bitch". She maintained in 1989 that Scheid had told her in 1987 that Petitioner would never be promoted within the Department and suggested that this was the reason that she redefined the job a year and a half later.

The alleged "no-promotion" statement of Scheid occurred at one meeting soon after Petitioner's investigation of Scheid had ended. After the purported statement, Van Tine had a number of discussions with Petitioner about a possible new position, encouraged Petitioner about his chances of getting the job and advised him to do some preparation for it. Then, without any further contract with Scheid about Petitioner, she supposedly changed the position description. There was no reason for Van Tine to encourage Petitioner if she took any purported statements made by Scheid seriously enough to later change the position description.

Petitioner's Statement of the Case is misleading when it refers to the new position as "his". All positions within the Department of Human Services must be publicly posted and all applicants considered. The State

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[2] Petitioner later encouraged a federal investigation of Scheid. The federal investigation did not result in any criminal charges.

of Ohio Department of Administrative Services must approve all position descriptions. Standard job descriptions are used for most positions. The prospective position which the administrator discussed with Petitioner was not one which had previously been approved by the State of Ohio. Therefore, it would have required approval by the Ohio Department of Administrative Services. The prospective position also would have created organizational and financial complications because it would have combined areas under the authority of separate units within the Department of Human Services which had separate funding sources. Although Van Tine claimed to have changed the job description due to Scheid's purported comment, when she prepared the description she actually used a boilerplate Department of Administrative Services' job description. None of the Erie County Commissioners had any input into the job description which Van Tine prepared.

The administrator and the three Erie County Commissioners had joint appointing authority for positions within the Department of Human Services. Scheid alone could not have prevented a promotion of Petitioner. In fact, during Van Tine's entire time as administrator, the commissioners always followed her job recommendations.

However, Van Tine's story about the denial of "his" promotion seems to have satisfied Petitioner. He had previously sued Huron County, Ohio, his former employer, on two occasions and had sued his own insurance company on another employment-related matter. In 1989, he found a higher paying job with the State of Ohio and resigned his position with Erie County. He then filed this action.

Petitioner attributes several other employment-related actions to his investigation of Scheid. In addition to claiming that he was "denied" the new job position, he cites two occasions when he had unpleasant experiences in his job. On one occasion, his supervisor, Respondent Catherine DeWalt, reprimanded him for performing an unauthorized credit check on a citizen. On another occasion, DeWalt sent him a memorandum reminding him of the need to follow standard departmental procedures.[3] These two incidents are the only actions of a disciplinary nature which involved Petitioner during his employment with Erie County. Now, he claims that these incidents were due to his investigation of Scheid. Yet, he has not produced any evidence that a desire for retaliation motivated these actions. His supervisor never had any discussions with Scheid about Petitioner. Had his supervisor wanted to cause problems for him, she could have created a much more extensive disciplinary record.

This action was originally focused primarily on Petitioner's due process claims. Those claims (as well as Petitioner's First Amendment claim) were rejected by both the district court and the court of appeals. Apparently, Petitioner has determined that his best chance to obtain Supreme Court review is based upon his First Amendment claim, and he now emphasizes that

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[3] Petitioner attempts to use this memorandum as evidence of a hostile work environment and of the removal of his power. However, Petitioner never had the discretion or the power suggested in his Statement of the Case. In fact, the instructions contained in the memorandum are all reminders of standard departmental policies and procedures. Although Petitioner had developed a practice of ignoring these policies, they were applicable throughout his employment and governed the other employees of the Department as well as Petitioner (R. 31: Thomson dep. 5, 9, 18, 21-23, 33).

claim. Because Petitioner was more concerned with his due process claims, he did not clearly develop his First Amendment claim in the courts below.

There is an overwhelming factual problem with Petitioner's attempt to state a First Amendment claim. The basis of Petitioner's claim is that Scheid caused retaliation against Petitioner as a result of Petitioner's participation in the Scheid investigation. Scheid's purported complaints to Van Tine all relate the *attitude* of Petitioner and the *manner in which he conducted* the investigation. The report which Petitioner prepared and his discussions with supervisors were highly confidential. There is no evidence that Scheid ever saw the report, knew of anything that Petitioner said to his supervisors or knew that Petitioner asked federal authorities to investigate Scheid. Since the record does not show that what Petitioner said had any effect on his employment, there is no proper First Amendment claim. Petitioner's arguments show the grossest of factually unsupported *post hoc, ergo propter hoc* reasoning, and the lower courts properly found that Petitioner failed to meet his burden to avoid summary judgment.

SUMMARY OF ARGUMENT

The facts of this case, as described herein and in the decision of the court of appeals, demonstrate that Petitioner was not engaged in protected speech in discussing the Scheid investigation with his supervisors or in preparing his report on that investigation. He was merely performing his job duties in furtherance of the internal operation of the Department of Human Services subject to an obligation of confidentiality. In addition, Petitioner's arguments do not suggest that he suffered retaliation for the content of his speech (which was unknown to Scheid). Petitioner acknowledges that Scheid's complaints concerned Petitioner's attitude and manner of performing his job.

The court of appeals' decision was based upon the particular facts of this case. It has a narrow application to these facts and has no overriding significance. The decision does not set forth any broad constitutional principle which conflicts with the holdings of this Court or of other circuits. This case does not deserve the Court's consideration. In addition, the traditional reluctance of federal courts to become involved in disputes over the terms of employment must also weigh against review of this action. As a result, the Respondents respectfully suggest that the Court deny the motion for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. Based Upon The Specific Facts Of This Case, The Court Of Appeals Determined That Petitioner Did Not Engage In Speech Protected By The First Amendment.

In his effort to convince this Court to review his case, Petitioner exaggerates the scope of the court of appeals' ruling and emphasizes the significance of legal principles which were not at issue. Petitioner suggests that the court of appeals adopted a "per se" rule holding that an employee speaking as part of his official duties is not protected by the First Amendment. Examination of the court of appeals' decision reveals that it did not adopt such a rule. The court below found that the communications in this case were part of the job responsibilities of the people involved and were subject to an obligation of confidentiality. The court of appeals held that, based upon the narrow and peculiar facts of this case, the discussions concerning the Scheid investigation were matters of internal departmental policy. As a result, the court of appeals determined that the investigative report and related discussions did not amount to "speaking out" on an issue of public concern. *See Thomson v. Scheid, et al., supra* at 1021.

Petitioner relies upon his assertion that the Sixth Circuit panel applied a "per se" rule in order to create an imagined conflict with the decisions of other circuits. Petitioner suggests that the court of appeals' decision is inconsistent with *Koch v. Hutchinson*, 847 F.2d 1436 (10th Cir. 1988) and *Egger v. Phillips*, 710 F.2d 292 (7th Cir. 1983). Although Petitioner focuses on *Koch* and *Egger* as the basis for his conflict argument, he does not

present any meaningful discussion of those decisions and does not elaborate upon the purported conflict that they represent. In fact, no such conflict exists.

In *Koch, supra*, the court held that whether or not a public employee's speech in the course of his official duties constituted speaking out on an issue of public concern for the purpose of First Amendment protection was to be determined by the particular circumstances of each case. The court rejected any "per se" rule but found that the fact that the speech occurred as part of the employee's official duties was a significant factor in determining whether it was protected. *Id.* at 1442. In fact, the court emphasized that the speech at issue in the case was a "routine official report" and concluded that it was not protected by the First Amendment. *Id.* at 1447.

The Seventh Circuit's holding in *Egger v. Phillips, supra*, is not in conflict with the Sixth Circuit's position. *Egger* merely holds that the expression of views within the workplace does not preclude protection under the First Amendment. *Id.* at 316. In *Egger*, the court held that it must consider the substance and purposes of the speech. *Id.* Yet, it stated:

> Speech which triggers the more difficult *Pickering* problems is that which implicates questions which are not of *essentially institutional concern* or of personal concern to the individuals involved, but speech which implicates broader interests with societal ramifications. (emphasis added) *Id.*

In this case, the lower courts determined that, in the context in which they were made, any statements of Petitioner were essentially of institutional concern. Therefore, the decision is consistent with the analysis in *Egger*.

Petitioner cites no other decisions which supposedly conflict with the Sixth Circuit's opinion. However, he attempts to present this case as involving an important constitutional issue by a broad discussion of what is an issue of "public concern" entitled to First Amendment protection. The bulk of Petitioner's argument is devoted to his insistence that there is need for clarification on that issue. However, that issue is not relevant to the court of appeals' decision in this case. The court of appeals simply held that, because the discussions between Petitioner and his supervisors concerned the official actions of the Department and are governed by an obligation of confidentiality, Petitioner was speaking to an internal office affair rather than speaking out on an issue of public concern. Therefore, should this Court see any need to clarify *Connick v. Meyers*, 461 U.S. 138 (1983), or to further define what issues are of "public concern", this is not the appropriate case in which to do so. The narrow factual basis for the decisions in the courts below would prevent a significant examination of those issues.

II. This Case Is Based Upon A Personnel Dispute Not Appropriate For Involvement Of The Federal Courts.

This Court has, in the past, been reluctant to become involved in disputes which are essentially personnel matters. *Bishop v. Wood*, 426 U.S. 341, 349-350 (1976). In keeping with their reluctance to become involved in such disputes, federal circuit courts have carefully approached such cases, even if the employment disputes are couched in claims based upon the First Amendment. *See e.g., Barkoo v. Melby*, 901 F.2d 613 (7th Cir. 1990). *Barkoo* states:

> Federal courts must exercise great caution before stepping into empioyment disputes, and must be convinced an actual constitutional right has been significantly impaired. *Id.* at 617.

At its crux, this case involves Petitioner's unhappiness over personnel actions during his employment. Petitioner did not receive a promotion (for which he never applied and may not have been qualified) and was involved in two incidents in which his supervisor criticized his conduct. The fact that this action originally focused on due process claims further demonstrates its roots in personnel issues.

Petitioner had available adequate administrative remedies for his complaints. The Sixth Circuit has specifically considered the administrative and judicial processes available to governmental employees in Ohio and has found them to be adequate. *Meyers v. City of Cincinnati*, 934 F.2d 726 (6th Cir. 1991). Yet, Petitioner never utilized any of these procedures. A danger involved in any modification of the decision rendered below is that it will encourage inappropriate attempts to use federal courts for employment-related complaints.

CONCLUSION

For these reasons, the motion for writ of certiorari should be denied.

Respectfully submitted,

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